

THE O'MARA LAW FIRM, P.C.

David C. O'Mara
311 East Liberty St.
Reno, Nevada 89501
Tel: 775-323-1321
Fax: 775-323-4082
Email: david@omaralaw.net

LEVI & KORSINSKY, LLP

Adam M. Apton
55 Broadway, 10th Floor
New York, NY 10006
Tel: (212) 363-7500
Fax: (212) 363-7171
Email: aapton@zlk.com

Attorneys for Movant Cory Jay Wiedel

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TAD SCHLATRE, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

MARATHON DIGITAL HOLDINGS,
INC. f/k/a MARATHON PATENT
GROUP, INC., MERRICK D.
OKAMOTO, FREDERICK G. THIEL,
and SIMEON SALZMAN,

Defendants.

Case No. 2:21-cv-02209-RFB-NJK

**MEMORANDUM OF POINTS AND
AUTHORITIES IN FURTHER SUPPORT
OF CORY JAY WIEDEL'S MOTION FOR
APPOINTMENT AS LEAD PLAINTIFF
AND APPROVAL OF SELECTION OF
COUNSEL AND IN OPPOSITION TO ALL
COMPETING MOTIONS**

HEARING REQUESTED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	ARGUMENT	2
A.	Mr. Wiedel is the Presumptive Lead Plaintiff	2
1.	Mr. Wiedel Has the Largest Financial Interest in the Relief Sought by the Class	2
2.	Mr. Wiedel Has Made the Requisite Prima Facie Showing of His Typicality and Adequacy Under Rule 23	4
B.	Mr. Marina Incorrectly Calculated His Loss.	6
C.	No Movant Can Rebut the Strong Presumption in Favor of Appointing Mr. Wiedel as Lead Plaintiff	7
III.	CONCLUSION	7

1 Lead plaintiff movant Cory Jay Wiedel (“Mr. Wiedel”) respectfully submits this
 2 memorandum of law in opposition to all other competing lead plaintiff motions and in further
 3 support of his motion (“Motion”) for (i) appointment as Lead Plaintiff in the above-captioned
 4 action (the “Action”); and (ii) approval of his selection of Levi & Korsinsky, LLP (“Levi &
 5 Korsinsky”) as Lead Counsel for the proposed Class and The O’Mara Law Firm P.C. (“O’Mara”) as
 6 Liaison Counsel.¹

7 **I. PRELIMINARY STATEMENT**

8 The Securities Exchange Act of 1934 (“Exchange Act”) as amended by the Private
 9 Securities Litigation Reform Act of 1995 (15 U.S.C. §78u-4) (the “PSLRA”), sets forth a clear
 10 directive in terms of appointing lead plaintiffs to serve in securities class actions. It instructs courts
 11 to appoint as lead plaintiff the plaintiff “most capable of adequately representing the interests of
 12 class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i). That person or entity is the plaintiff or movant
 13 with the “largest financial interest in the relief sought by the class” who also satisfies the
 14 requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-
 15 4(a)(3)(B)(iii)(I). Without any evidence from the other competing movants showing that Mr.
 16 Wiedel is somehow atypical or inadequate to serve as lead plaintiff, the Court should grant his
 17 motion, approving him and his chosen counsel as lead plaintiff and lead counsel, respectively.

18 Mr. Wiedel sustained a loss of \$494,650.28 from trading Marathon securities during the
 19 class period between October 13, 2020 and November 15, 2021, inclusive. ECF No. 1 at ¶1. The
 20 other movants seeking to serve as lead plaintiff sustained losses significantly less than that of Mr.
 21 Wiedel, as the following table shows:

22
 23
 24
 25
 26 ¹ Unless otherwise defined herein, capitalized terms shall have the same meanings as set forth in the Cory Jay
 27 Wiedel’s Motion For Appointment As Lead Plaintiff And Approval Of Selection Of Counsel; And Memorandum
 Of Points And Authorities. *See* ECF No. 11.

Movant	Losses
Cory Jay Wiedel	\$ 494,650.28
Carlos Marina	\$264,421.41 ²
Evan Dana	\$ 184,571.98
Pathma Venasithamby	\$ 57,433.96
Tad Schlatre	\$ 38,529.00

Given that Mr. Wiedel sustained a greater loss than the other movants, there can be no dispute that Mr. Wiedel holds the “largest financial interest” in the action. Moreover, Mr. Wiedel is typical of the other class members insofar as he purchased Marathan securities during the class period at inflated prices and was damaged in the same manner as all other class members. He does not have any interests adverse to the class and, as demonstrated in his declaration accompanying his motion, he is ideally suited to serve as the lead plaintiff given his educational and professional background.

As explained further *infra*, Mr. Wiedel should be appointed as lead plaintiff and his choice of Levi & Korsinsky as lead counsel should be approved.

II. ARGUMENT

A. Mr. Wiedel is the Presumptive Lead Plaintiff

1. Mr. Wiedel Has the Largest Financial Interest in the Relief Sought by the Class

Courts in this Circuit have considered the four factors of the *Lax/Olsten Test* when identifying the movant with the greatest financial interest: (1) number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net

² Mr. Marina’s loss is adjusted to account for calculation errors he appears to have made inadvertently, as discussed in Section II.B, *infra*.

funds expended during the class period; and (4) the approximate losses suffered. *Robb*, 2016 U.S. Dist. LEXIS 62457, at *8; *Knox v. Yingli Green Energy Holding Co. Ltd.*, 136 F. Supp. 3d 1159, 1163 (C.D. Cal. 2015). Most courts have found that the fourth factor, approximate loss suffered, is the most important factor and afford it the greatest weight in determining which movant has the largest financial interest. *Id.* (noting that “the last of these factors typically carries the most weight”); *see also In re Aqua Metals Sec. Litig.*, No. 17-cv-07142-HSG, 2018 U.S. Dist. LEXIS 86889, at *7 (N.D. Cal. May 23, 2018) (equating losses with greatest financial interest). Mr. Wiedel has the largest financial interest of any competing movant in this Action by nearly **double** the closest movant’s loss, or over \$229,000. Similarly, Mr. Wiedel’s financial interest is greater than the other movants when considering the other factors considered by the courts in this Circuit, as demonstrated below:

Movant	Gross Shares Purchased	Net Shares Retained	Net Funds Expended	Claimed Losses
Cory Jay Wiedel	68,000	14,750	\$1,010,134.97	\$ 494,650.28
Carlos Marina ³	598	0	\$670,071.41	\$264,421.41 ⁴
Evan Dana	46,223	17,000	\$ 784,299.08	\$ 184,571.98
Pathma Venasithamby	1,800	1,800	\$ 129,198.32	\$ 57,433.96
Tad Schlatre	3,188	1,002	\$ 73,877.54	\$ 38,529.00

Mr. Wiedel purchased 68,000 shares of Marathon, retained 14,750 shares through the end of the Class Period, expended over \$1 million in net funds to purchase Marathon securities, and lost nearly \$500,000. When applying each of the factors of the *Lax/Olsten Test*, Mr. Wiedel has

³ Mr. Marina’s first two *Lax/Olsten* factors only reflect common stock, while the last two are inclusive of his options data. Mr. Marina’s gross options purchased (buy to open) were 1,150, gross options sold (sold to open) were 293 and his net options retained were 400.

⁴ In his opening motion and his submitted loss calculation, Mr. Marina overstated the size of his financial interest in the litigation, claiming a loss of \$473,905.41, when in fact his loss is only \$264,421.41, due to a miscalculation of one of his options contracts. *See* II.B., *infra*.

1 the largest financial interest in this litigation under three of the four measures courts traditionally
 2 rely on in evaluating a lead plaintiff candidate's financial interest under the PSLRA. The
 3 foregoing should end the financial interest inquiry.

4 **2. Mr. Wiedel Has Made the Requisite Prima Facie Showing of His**
 5 **Typicality and Adequacy Under Rule 23**

6 Once the movant with the largest financial interest has been established – here Mr. Wiedel
 7 – the Court must next assess whether that movant, and that movant alone, has made a *prima facie*
 8 showing of Rule 23. *Cavanaugh*, 306 F.3d at 732; 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). Of the
 9 four prerequisites, only two - typicality and adequacy - are relevant inquiries on a motion for lead
 10 plaintiff, as they address the personal characteristic of the class representative. *See Ali v. Intel*
 11 *Corp.*, No. 18-cv-00507-YGR, 2018 U.S. Dist. LEXIS 89401, at *5 n.7 (N.D. Cal. May 29, 2018).
 12 Here, Mr. Wiedel easily satisfies the typicality and adequacy requirements of Rule 23, triggering
 13 the statutory presumption of lead plaintiff in his favor.

14 A lead plaintiff's claims are typical with the claims of the class when the plaintiff
 15 purchased shares of the defendant company at prices that were artificially inflated due to the same
 16 market-wide false statements relied on by other members of the class, and suffered losses in the
 17 same manner as those class members as a result. *In re Aqua Metals Sec. Litig.*, 2018 U.S. Dist.
 18 LEXIS 86889, at *8 (“the test of typicality is whether other members have the same or similar
 19 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
 20 whether other class members have been injured by the same course of conduct.”) (quoting *Hanon*
 21 *v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

22 Mr. Wiedel's claims are typical of those of other Class members because, like other Class
 23 members, he purchased Marathon securities during the Class Period at prices artificially inflated
 24 by Defendants' misrepresentations and/or omissions that form the basis of the Action. Mr. Wiedel
 25 suffered substantial losses as a result of the alleged fraud in the Action, and his claims are based
 26 on the same legal theory that arise from the same events and course of conduct as the Class's
 27 claims. *See Veal v. LendingClub Corp.*, No. 18-cv-02599-BLF, 2018 U.S. Dist. LEXIS 190912,

at *11(N.D. Cal. Nov. 7, 2018) (typicality satisfied where losses incurred by suffering damages when misrepresentations or omissions came to light); *Deora v. NantHealth, Inc.*, No. CV 17-01825 BRO (MRWx), 2017 U.S. Dist. LEXIS 117499, at *9 (C.D. Cal. May 31, 2017) (same).

The adequacy requirement of Rule 23 is satisfied when a class representative establishes that it will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “The test for adequacy asks whether the lead plaintiff and his counsel ‘have any conflicts of interest with other class members’ and whether the lead plaintiff and his counsel will ‘prosecute the action vigorously on behalf of the class.’” *Welgus v. TriNet Grp., Inc.*, No. 15-cv-03625-BLF, 2015 U.S. Dist. LEXIS 162547, at *8 (N.D. Cal. Dec. 3, 2015) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)). The adequacy requirement is met if no conflicts exist between the representative’s interests and those of the class, and the representative’s attorneys are qualified, experienced, and generally able to conduct the litigation. *Schwartz v. Opus Bank*, No. CV 16-07991-AB (JPRx), 2017 U.S. Dist. LEXIS 217637, at *6-7 (C.D. Cal. Feb. 23, 2017).

Mr. Wiedel has demonstrated his adequacy to serve as Lead Plaintiff in this Action. First, Mr. Wiedel has selected Levi & Korsinsky to serve as Lead Counsel for the Class. Levi & Korsinsky is a qualified counsel with substantial experience litigating securities class actions. *See* ECF No. 11-7; *see also, e.g., Isaacs v. Musk*, No. 18-cv-04865-EMC, 2018 U.S. Dist. LEXIS 200717, at *8 (N.D. Cal. Nov. 27, 2018) (noting Levi & Korsinsky “is experienced in securities fraud litigation”) *recons. denied In re Tesla, Inc. Sec. Litig.*, No. 18-cv-04865-EMC, 2018 U.S. Dist. LEXIS 212238 (N.D. Cal. Dec. 17, 2018); *In re Aqua Metals*, 2018 U.S. Dist. LEXIS 86889, at *12-13 (same).

Second, Mr. Wiedel possesses the largest financial interest in this Action. This will ensure his vigorous and adequate prosecution of the Class’s claims. *In re Aqua Metals*, 2018 U.S. Dist. LEXIS 86889, at *9 (movant’s “substantial financial stake in the outcome of this litigation, its timely filing of its motions, and the quality of its briefing all demonstrate that it is both motivated to, and capable of, vigorously pursuing this litigation.”).

Third, Mr. Wiedel has no conflicts with other Class Members. Indeed, his interests are

1 aligned with the Class's interests of maximizing a recovery for the Class due to the alleged fraud
 2 in this Action. *Ziolkowski v. Netflix, Inc.*, No. 17-cv-01070-HSG, 2017 U.S. Dist. LEXIS 91848,
 3 at *9 (N.D. Cal. June 14, 2017) (adequacy satisfied where no evidence of conflict between lead
 4 plaintiff and class); *see also* ECF No. 11-6.

5 Finally, Mr. Wiedel has further demonstrated his adequacy by submitting a declaration in
 6 support of his Motion, attesting that he is a sophisticated investor by providing his education,
 7 employment, and years of investing experience. ECF No. 11-6. Mr. Wiedel, a resident of Omaha,
 8 Nebraska, possesses a Bachelor of Science in agriculture. *Id.* at ¶2. He is also a businessman,
 9 owning his own location of Smash My Trash located in Omaha, Nebraska, where he oversees two
 10 employees. *Id.* Further, he has been investing in securities for 12 years. *Id.* He is knowledgeable
 11 about the litigation, has experience hiring and overseeing attorneys for routine business matters,
 12 and is committed and understands the obligations of a lead plaintiff under the PSLRA and plans
 13 to prosecute this Action efficiently. *Id.* at ¶¶2, 4.

14 **B. Mr. Marina Incorrectly Calculated His Loss.**

15 As noted above, Mr. Marina incorrectly calculated his financial interest in his opening
 16 motion papers. Mr. Marina purports to have a loss of \$473,905.41. *See* ECF Nos. 12 at p.5 & 12-
 17 5. However, this loss number appears to be vastly overstated due to a miscalculation. *See* ECF
 18 No. 12-5 at 5. On page 5 of the loss calculation filed by Mr. Marina, there was a calculation for
 19 option contract MARA Jun 17 2022 50.0 Call. It appears that in the "SALES" columns, the 200
 20 options contracts sold on 1/21/2022 were treated as common stock, rather than options (where
 21 each option represents 100 shares. *i.e.*, 120 options would be 1,200 shares).⁵ The total amount
 22 received for these sales should have been \$211,600, instead of the \$2,116.00 value shown.⁶ This
 23 miscalculation resulted in an overstatement of Mr. Marina's losses by more than \$200,000. *See*

24
 25 ⁵ An additional error on this page appears in the text annotation under the "PURCHASES" columns. The language
 26 "40 shares at **\$12.04**" should read "40 shares at **\$2.04**" to be consistent with the price listed on Mr. Marina's Schedule
 A attached to his PSLRA certification.

27 ⁶ When checking Mr. Marina's losses, Mr. Wiedel's counsel treated any purchase and sale dates appearing to be in
 28 the future (a later date in 2022 that has yet to occur) as occurring in 2021. *See* ECF Nos. 12-5 at pp. 4, 7, 12 & 12-7
 at pp. 3, 4.

1 *Camp v. Qualcomm Inc.*, No. 3:18-cv-1208-AJB-BLM, 2019 U.S. Dist. LEXIS 130746, at *6
 2 (S.D. Cal. Aug. 5, 2019) (“[W]hile the inaccuracy in calculations may be explainable it casts
 3 sufficient doubt on plaintiff’s adequacy as a representative plaintiff”)(internal citations and
 4 quotations omitted); *see also Irving Firemen's Relief & Ret. Fund v. Tesco PLC*, 2015 U.S. Dist.
 5 LEXIS 38635, at *12 (S.D.N.Y. Mar. 19, 2015) (concluding that incorrect loss calculations
 6 “undermine[] [movant’s] adequacy as lead plaintiff”).⁷

7 **C. No Movant Can Rebut the Strong Presumption in Favor of Appointing Mr.**
 8 **Wiedel as Lead Plaintiff**

9 Importantly, because Mr. Wiedel has the largest financial interest in this litigation, the
 10 PSLRA provides a rebuttable presumption that he is the most adequate plaintiff to represent the
 11 Class. The “strong presumption” in favor of appointing Mr. Wiedel as Lead Plaintiff can only be
 12 rebutted with “proof” that Mr. Wiedel is somehow atypical or inadequate. 15 U.S.C. §78u-
 13 4(a)(3)(B)(iii)(II); *Cavanaugh*, 306 F.3d at 740-41 (“the presumption of most adequate plaintiff
 14 may be overcome only upon proof that the presumptively most adequate plaintiff ‘will not fairly
 15 and adequately protect the interests of the class’”). “Speculative assertions” are insufficient to
 16 rebut the lead plaintiff presumption. *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1054
 17 (N.D. Cal. 2001) (collecting cases). No such proof exists here. Accordingly, Mr. Wiedel is both
 18 typical and adequate and his Motion should be granted in its entirety.

19 **III. CONCLUSION**

20 For the foregoing reasons, Mr. Wiedel respectfully requests that the Court grant his
 21 Motion and enter an Order: (1) appointing Mr. Wiedel as Lead Plaintiff, (2) approving his
 22 selection of Levi & Korsinsky as Lead Counsel for the Class, (3) granting such other relief as the
 23 Court may deem just and proper; and (4) denying all other competing motions.

24 //

25
 26 ⁷ It also bears mentioning that the vast majority of Mr. Marina’s losses stem from option transactions, which arguably
 27 sets him apart from the majority of the class. *See Patel v. Reata Pharm., Inc.*, No. 4:20-CV-796-SDJ, 2021 U.S. Dist.
 28 LEXIS 132164, at *13-17 (E.D. Tex. July 15, 2021) (“the fact that Massar's losses during the Class Period were
 based solely on option contracts renders Massar atypical of the putative class”).

1 Dated: March 1, 2022

Respectfully submitted,

2 **THE O'MARA LAW FIRM, P.C.**

3 /s/ David C. O'Mara

4 David C. O'Mara
5 311 East Liberty St.
6 Reno, Nevada 89501
7 Tel: 775-323-1321
8 Fax: 775-323-4082
9 Email: david@omaralaw.net

10 *Liaison Counsel for Cory Jay Wiedel and*
11 *[Proposed] Liaison Counsel for the Class*

12 **LEVI & KORSINSKY, LLP**

13 Adam M. Apton*
14 55 Broadway, 10th Floor
15 New York, NY 10006
16 Tel: (212) 363-7500
17 Fax: (212) 363-7171
18 Email: aapton@zlk.com
19 *pro hac vice forthcoming

20 *Lead Counsel for Cory Jay Wiedel and [Proposed]*
21 *Lead Counsel for the Class*

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2022, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ David C. O'Mara

David C. O'Mara